MOTION FILED
DEC 21 1984

(4)

No. 84-825

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

MARY P. LAFFEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEPHEN A. BOKAT
Counsel of Record
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Amicus Curiae Chamber of Commerce of the United States

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

22pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-825

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

MARY P. LAFFEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Chamber of Commerce of the United States ("Chamber") hereby moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case pursuant to Supreme Court Rule 36.1. This motion is necessary because the respondents declined to consent to the filing of the brief. The petitioner,

Northwest Airlines, Inc., has consented to the filing.[1] This amicus brief is timely filed under Supreme Court Rule 36.1, as it is filed within 30 days, the time allowed by Supreme Court Rule 22.1 for the filing of a brief in opposition to the petition for certiorari.

This case arose out of the petitioner's classification of cabin attendants some 14 years ago. Northwest maintained two such classifications, one of which was not available at that time to women.

The lower court's disposition of the case raised several problematic issues that require clarification by this Court. Those issues are (a) whether discriminatory motive on the part of an employer is required for a finding of liability for disparate wages under the Equal Pay Act, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 2000e-5(g); (b) whether an "objective job evaluation system" is required before the "factor other than sex" defense can be asserted; (c) the meaning of the term "willful violation" within the Fair Labor Standards Act, 29 U.S.C. § 255 ("FLSA") and the Equal Pay Act; and (d) the relevance of industry practice and approval in *bona fide* collective bargaining agreements to a determination of an employer's "good faith" and "reasonable grounds" in concluding that an employment practice is lawful.

The Chamber is concerned about the great consternation this decision is causing in the business community, where an employer with a legitimate belief that one position requires greater skill than another, and thus justifies higher pay, now must fear liability without regard to his motive or the reasonableness of his belief. The Chamber believes it is important for this Court to recognize the need for a clearly defined standard governing challenges to the lawfulness of wage rates. Employers cannot now

---

[1] Copies of the consent letter are being filed simultaneously with the attached brief.

be certain about the proper bases for wage differentials, and multi-jurisdictional employers may be subject to varying standards in different parts of the country.

Moreover, differing interpretations of the term "willful violation" in the Fair Labor Standards Act and the Equal Pay Act (a component of the FLSA) have injected confusion and inequity into the administration of these statutes.

The question of the meaning of "willful violation" within the FLSA and the Equal Pay Act is closely related to the willfulness issue under the Age Discrimination in Employment Act now before the Court in *TWA v. Thurston*, No. 83-997. The Chamber submitted a brief *amicus curiae* in *Thurston* as well. Confusion about the meaning of "willful violation" creates an enormous burden on employers, who are required to comply with all three statutes. The burden is particularly heavy for multi-jurisdictional employers, who may be subject to different standards, and small business owners, who lack the resources to keep current on the latest legal developments.

The issues presented by this case are fundamental to the application of the Equal Pay Act and Title VII. Guidance in complying with this legislation is critical to the business community. As the largest federation of business organizations and individuals in the United States, and the principal spokesman for the American business community, the Chamber is well-suited to present the broad interest of business in this case. The Chamber's current membership exceeds 184,000, including over 180,000 corporations, partnerships and proprietorships, as well as over 2,900 trade associations, and local and state chambers. As one of its principal functions, the Chamber regularly presents its views before this Court, as well as the lower federal courts.[2]

---

[2] *See, e.g., TWA* v. *Thurston, cert. granted,* 52 U.S.L.W. 3625 (U.S. Feb. 27, 1984) (No. 83-997); *Bowen* v. *U.S. Postal Service,* —— U.S. ——, 74 L.Ed. 2d 402 (1983); *Amoco Production Co.* v. *NLRB,* 613 F.2d 107 (5th Cir. 1980).

Businesses attempting to comply with wage discrimination laws are currently confronted with complex, multiple legal tests. A uniform standard is essential to fair administration of the law. It is for these reasons that the Chamber respectfully requests leave to file the attached brief. Businesses attempting to comply with wage discrimination laws are currently confronted with complex, multiple legal tests. A uniform standard is essential to fair administration of the law.

Respectfully submitted,

STEPHEN A. BOKAT
Counsel of Record
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Amicus Curiae Chamber of Commerce of the United States

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
ARGUMENT	1
I. CONFUSION EXISTS AFTER *GUNTHER* CONCERNING THE "FACTOR OTHER THAN SEX" DEFENSE TO EQUAL PAY CLAIMS BASED ON ALLEGED SEX DISCRIMINATION	2
A. This Court Should Resolve the Conflict Over Whether Discriminatory Interest Is An Element of Sex-Based Wage Discrimination Claims	2
B. This Court Should Clarify What Constitutes A "Factor Other Than Sex"	5
II. THE COURT SHOULD RESOLVE THE CONTROVERSY OVER THE MEANING OF "WILLFUL VIOLATION" BY CONSIDERING ALL AFFECTED STATUTES AND THE PERTINENT LEGISLATIVE HISTORY	8
A. The Willfulness Issue in *Thurston* Should Be Decided In The Broader Context Illuminated By *Laffey*	9
B. A Single Standard Under All Three Statutes Will Ensure Consistent, Predictable Results For Employers	10
III. THE STANDARD ADOPTED BY THE COURT BELOW FOR ASSESSING LIQUIDATED DAMAGES IS UNWORKABLE AND CONFLICTS WITH THE APPROACH IN OTHER CIRCUITS	12
CONCLUSION	13

TABLE OF AUTHORITIES

CASES: Page

Adams v. Reed, 567 F.2d 1283 (5th Cir. 1978) 7
Airline Pilots Ass'n v. TWA, 713 F.2d 940 (2d Cir. 1983), *cert. granted sub nom. TWA v. Thurston*, No. 83-997 (U.S. argued Oct. 9, 1984) 8, 9, 10, 11
Bronson v. Board of Education, 550 F.Supp. 941 (S.D. Ohio 1982) 4
Campbell v. Von Hoffman Press, Inc., 632 F.2d 69 (8th Cir. 1980) 7
Cannon v. University of Chicago, 441 U.S. 677 (1979) 4
Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir.), *mandamus denied*, 454 U.S. 811, *cert. denied*, 454 U.S. 1128 (1981), *and* 460 U.S. 1013 (1983) 4
Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) 4
Connecticut v. Teal, 457 U.S. 440 (1982) 3
County of Washington v. Gunther, 452 U.S. 161 (1981) .... *passim*
Frink v. United States Navy, 16 FEP Cases 67 (E.D. Pa. 1977), *aff'd mem.*, 609 F.2d 501 (3d Cir. 1979), *cert. denied*, 445 U.S. 930 (1980) 7
Griggs v. Duke Power Co., 401 U.S. 424 (1971) .. 2, 5
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 4
Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976) (*"Laffey I"*), *cert. denied*, 424 U.S. 1096 (1978) .... *passim*
Laffey v. Northwest Airlines, Inc., 740 F.2d 1071 (*"Laffey III"*) (D.C. Cir. 1984) .... *passim*
Maxwell v. City of Tucson, 35 FEP Cases 355 (9th Cir. 1984) 3
Personnel Administrator v. Feeny, 442 U.S. 256 (1979) 4
Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983) 3
Sinclair v. Automobile Club of Oklahoma, Inc., 733 F.2d 726 (10th Cir. 1984) 3

TABLE OF AUTHORITIES—Continued

Page

TWA v. Thurston, No. 83-997 (U.S. argued Oct. 9, 1984) ..... *passim*
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 4
Washington v. Davis, 426 U.S. 229 (1976) 4
Winkes v. Brown University, 36 FEP Cases 120 (1st Cir. 1984) 7

ADMINISTRATIVE DECISION:

EEOC Dec. 75-225, 21 FEP Cases 1774 (1975) 8

STATUTES:

Age Discrimination in Employment Act:

29 U.S.C. § 626(b) 8, 9, 10
29 U.S.C. § 626(e)(1) 9, 10

Equal Pay Act of 1963:

29 U.S.C. § 206(d)(1) ..... *passim*

Fair Labor Standards Act:

29 U.S.C. § 216(b) 11
29 U.S.C. § 251(a) 13
29 U.S.C. § 251(b) 13
29 U.S.C. § 255 ..... 9, 11
29 U.S.C. § 260 ..... 11, 12

Civil Rights Act of 1964:

Title II, Section 201, 42 U.S.C. § 2000a 4
Title VI, Section 601, 42 U.S.C. § 2000d 4
Title VII, Section 703, 42 U.S.C. § 2000e-2(h) 4, 5
Title IX, Section 901, 20 U.S.C. § 1681 4
Pub. L. No. 89-601 (1966) 9

LEGISLATIVE MATERIALS:

109 Cong. Rec. 9195 (1963) 4
109 Cong. Rec. 9198, 9203 (1963) 5

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS:

	Page
Gould, The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term, 53 U.Col. L. Rev. 1 (1981)	3
Rutherglen, Major Issues in the Federal Law of Employment Discrimination (Federal Judicial Center 1983)	3
Spe..ogel, Equal Pay for Work of Comparable Value: A New Concept, 32 Lab. L.J. 30 (1981)	6
Note, Age Discrimination and The Disparate Impact Doctrine, 34 Stan. L. Rev. 837 (1982)	3
Note, Gender-Based Wage Discrimination and the Bennett Amendment: *County of Washington v. Gunther*, 1982 B.Y.U. L. Rev. 401	3
Note, Equal Pay, Comparable Work and Job Evaluation, 90 Yale L.J. 657 (1981)	6
Note, Standards of Willfulness and the Fair Labor Standards Act, 78 Mich. L. Rev. 626 (1980)	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-825

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

MARY P. LAFFEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief Amicus Curiae for a statement of the Chamber's interest in this proceeding.

ARGUMENT

Because of its breadth, the decision of the Court of Appeals in *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976) (*"Laffey I"*), *cert. denied*, 424 U.S. 1096 (1978), has received extensive attention from other courts addressing equal pay claims under the Equal Pay Act and Title VII of the Civil Rights Act of 1964, as

well as from courts confronting numerous issues under the Fair Labor Standards Act (of which the Equal Pay Act is a part). The decision has been cited or discussed, sometimes critically, in hundreds of cases in the federal and state courts. Thus, it is particularly important that this Court grant review to determine whether the rulings in *Laffey* are sound and consistent with the holdings of this Court and to ensure that they do not lead to confusion in critical areas of employment law.

I. CONFUSION EXISTS AFTER *GUNTHER* CONCERNING THE "FACTOR OTHER THAN SEX" DEFENSE TO EQUAL PAY CLAIMS BASED ON ALLEGED SEX DISCRIMINATION.

A. This Court Should Resolve The Conflict Over Whether Discriminatory Intent Is An Element Of Sex-Based Wage Discrimination Claims.

In *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court held that the Bennett Amendment to Title VII, 42 U.S.C. 2000e-2(h), incorporates into Title VII the four defenses contained in the Equal Pay Act. *See* 29 U.S.C. § 206(d)(1). This Court focused specifically on the fourth defense, which provides that an employer is not liable for paying a member of one sex more than a member of the opposite sex for performing "equal work" if the wage differential is "based on any other factor other than sex." The Court noted that this defense was "designed differently" from Title VII's "broadly inclusive" prohibition of discriminatory employment practices. 452 U.S. at 170. The Court distinguished sex-based equal pay claims, whose coverage is "confine[d]" to "wage differentials attributable to sex discrimination," from other types of discrimination claims falling under the broader provisions of Title VII, which the Court described as "proscribing 'not only overt discrimination but also practices that are fair in form, but discriminatory in operation.'" *Id., quoting Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Courts and

comentators subsequently have interpreted the *Gunther* analysis as meaning that "proof of disparate treatment, not just disparate impact," is required "in claims of sexual discrimination in compensation." G. Rutherglen, *Major Issues in the Federal Law of Employment Discrimination* 53 (Federal Judicial Center 1983); *see e.g.* authorities cited in Northwest Petition at 10-11. If the ultimate issue is one of disparate treatment rather than merely disparate impact, discriminatory intent is an essential element of every equal pay case under the Equal Pay Act and Title VII. *See Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

Not all circuits, however, have drawn this inference. While the Fifth and Ninth Circuits regard discriminatory intent as crucial to finding liability in equal pay cases, the District of Columbia and Tenth Circuits do not.[1] This Court should grant certiorari to resolve the conflict concerning this question, which has enormous legal and practical significance. It is important for employers, employees, and courts to have a single, clearly defined standard governing the challenges to the lawfulness of wage rates under which some men and some women may fare differently.

The interpretation of the language of the Equal Pay Act adopted by *Gunther*—incorporating the concept of

---

[1] *Compare Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071 (D.C. Cir. 1984) (*"Laffey III"*); *Sinclair v. Automobile Club of Oklahoma, Inc.*, 733 F.2d 726 (10th Cir. 1984), with *Maxwell v. City of Tucson*, 35 FEP Cases 355 (9th Cir. 1984); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127 (5th Cir. 1983).

Although most commentators have agreed that *Gunther* limits equal pay claims to instances of intentional discrimination, some have argued against that result. *Compare, e.g.*, Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. Col. L. Rev. 1, 66 (1981); Note, *Age Discrimination and The Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 846 (1982), *with* Note, *Gender-Based Wage Discrimination and the Bennett Amendment: County of Washington v. Gunther*, 1982 B.Y.U. L. Rev. 401, 407-12.

discriminatory intent—is consistent with the traditional notion of discrimination that had been embodied in prior anti-discriminaton provisons. Earlier provisions unquestonably require a showing of discriminatory intent. *See, e.g., Washington v. Davis*, 426 U.S. 229 (1976) (discrimination claims under the Constitution); *Personnel Administrator v. Feeny*, 442 U.S. 256 (1979) (same); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (discrimination claims under the Civil Rights Act of 1866). The Equal Pay Act of 1963, which prohibits employers from "discriminat[ing] . . . on the basis of sex," was conceived against this backdrop of anti-discrimination legislation. *See* 109 Cong. Rec. 9195, 8915 (1963) (remarks of Rep. Powell, Sen. Randolph). The court below, in rejecting an intent requirement for equal pay liability, ignored congressional intent and the longstanding definition of "discrimination" generally understood at the time the Equal Pay Act was adopted.

The language of the 1964 Civil Rights Act vividly illustrates this key distinction. In Section 703(a)(1) of Title VII, Congress used language comparable to that used in the Equal Pay Act, banning "discrimination" against employees. Section 703(a)(1) is the statutory basis for "disparate treatment" claims, which this Court has held require a showing of discriminatory intent. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Similarly, claims under Titles II, VI and IX of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000a, 2000d; 20 U.S.C. § 1681, which also bar "discrimination" on various bases, require a showing of discriminatory intent. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979); *Cannon v. University of Chicago*, 648 F.2d 1104 (7th Cir.), *mandamus denied*, 454 U.S. 811, *cert. denied*, 454 U.S. 1128 (1981), *and* 460 U.S. 1013 (1983); *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981); *Bronson v. Board of Education*, 550 F. Supp. 941 (S.D. Ohio 1982).

In stark contrast, Section 703(a)(2) of Title VII, which provides the basis for the "disparate impact" claims recognized in *Griggs*, prohibits any practice that "tends to deprive" a person of employment opportunities or "adversely affects" him. This language sweeps more broadly than the traditional concept of intentional "discrimination" embodied in Section 703(a)(1) of Title VII and in the Equal Pay Act. The Court of Appeals in *Laffey*, however, ignored this distinction in holding that the issue of discriminatory intent is irrelevant to equal pay claims.

B. This Court Should Clarify What Constitutes A "Factor Other Than Sex."

The opinion below in *Laffey v. Northwest Airlines, Inc.*, 740 F.2d 1071 (D.C. Cir. 1984) (*"Laffey III"*), compounds the confusion in the lower courts over the test for liability on equal pay claims after *Gunther*. In addition to ruling that discriminatory intent is not an issue in equal pay cases, the court below limited the "factor-other-than-sex" defense to "objective job rating systems" or "objective job evaluation systems." Pet. App. 12a. This holding is in direct conflict with the legislative history of the Equal Pay Act, which demonstrates that Congress did not intend to obligate an employer to institute a formal job evaluation system in order to avail himself of the "factor-other-than-sex" defense. 109 Cong. Rec. 9198, 9203 (1963) (remarks of Rep. Goodell, Rep. Griffin). In addition, the Chamber is concerned that the highly restrictive interpretation of the fourth defense in *Laffey III* may have the effect of reading the fourth defense out of the Equal Pay Act. Moreover, since it is in conflict with other decisions construing the defense, the ruling below subjects employers to varying and confusing standards.

The court below ruled that it is irrelevant to the "factor-other-than-sex" defense that the employer relied on a good faith internal assessment of the content and

requirements of the respective jobs and on the extensive history of *bona fide* collective bargaining, which had defined job categories and established wage rates. Instead, the court held that, in order to rely on the "factor-other-than-sex" defense in a case in which the court finds that two jobs, believed by the employer to be different, are in fact "substantially" equal, the employer must establish that the different wage rates were based upon a formal, "objective" "job rating" or "job evaluation system."

The first three defenses of the Equal Pay Act, however, expressly deal with systems of that type and vindicate pay differentials based on the mechanical application of a "system" to determine wages. Those defenses cover seniority systems, merit systems and systems that measure earnings by quality or quantity of production. 29 U.S.C. § 206(d)(1)(i)-(iii). The fourth defense, by contrast, does not require use of any "system," but affords the employer a defense if he relies on *any* factor other than sex. By circumscribing the fourth defense to mechanically applied "systems," the court below has effectively read the defense out of the statute and virtually has required all employers, regardless of their size, to institute a formal rating system in order to avoid the risk of an equal pay claim. The Chamber believes that such a requirement goes far beyond the intent of Congress and, if followed, would impose enormous burdens and expense on employers.[2]

Moreover, under the decision below, employers cannot rely on the kinds of criteria that they have in the past,

---

[2] As a practical matter, the *Laffey III* holding imposes the same burden on employers as would a pure "equal pay for comparable worth" standard, since under a "comparable worth" standard employers would be forced to set up massive and costly job rating systems to compare jobs. *See* Spelfogel, *Equal Pay for Work of Comparable Value: A New Concept*, 32 Lab. L.J. 30 (1981); Note, *Equal Pay, Comparable Work, and Job Evaluation*, 90 Yale L.J. 657, 674-77 (1981).

with the approval of other courts, in establishing wage differentials. For example, courts have permitted an employer to pay more to one professional employee than another of the opposite sex, admittedly doing equal work, in response to outside job offers. *E.g., Winkes v. Brown University*, 36 FEP Cases 120 (1st Cir. 1984). The emphasis in *Laffey III* on job rating systems does not leave room for such a market evaluation of an employee's worth. Similarly, an employer might believe in good faith that a male employee doing the same job as women has supervisory potential and, hence, decide to pay him more to retain his services until a supervisory position becomes available. Under *Campbell v. Von Hoffman Press, Inc.*, 632 F.2d 69 (8th Cir. 1980), that pay differential would be based, permissibly, on a "factor other than sex;" under *Laffey III* it would not.

Finally, by foreclosing reliance on *any* subjective evaluation, the approach in *Laffey III* seems to make the "factor-other-than-sex" defense even harder for employers to establish than the "business necessity" defense otherwise applicable under Title VII. Applying normal Title VII principles, courts have permitted employers to use subjective criteria—such as "leadership ability," "ability to get along with others," the "ability to plan," "personality" and the like—in justifying allegedly discriminatory employment practices. *See, e.g., Adams v. Reed*, 567 F.2d 1283 (5th Cir. 1978); *Frink v. United States Navy*, 16 FEP Cases 67 (E.D. Pa. 1977), *affd mem.*, 609 F.2d 501 (3d Cir. 1979), *cert. denied*, 445 U.S. 930 (1980). Yet *Gunther* said that the incorporation into Title VII of the "factor-other-than-sex" defense made Title VII *less* "broadly inclusive" of sex-based wage discrimination claims than of other kinds of discrimination claims. 452 U.S. at 170.

The interpretation of the fourth defense adopted in *Laffey III*, therefore, turns *Gunther* on its head. Indeed, if a factor as subjective as "enthusiasm and attitude

about the job" can justify an otherwise discriminatory promotional decision, *see* EEOC Dec. 75-225, 21 FEP Cases 1774 (1975), there is no reason in logic or policy why an employer's good faith assessment of job content—confirmed by *bona fide* collective bargaining—should not be a permissible "factor other than sex" on which the employer may rely in setting wage rates.

The Chamber is concerned about the confusion that *Laffey* is causing in the business world. Employers are now subject to a high degree of uncertainty about proper bases for wage differentials, and multi-jurisdictional employers may be subject to different standards in different parts of the country. Guidance from this Court is necessary to provide employers and lower courts with a settled understanding about what constitutes a "factor other than sex." On behalf of the business community, therefore, the Chamber of Commerce urges this Court to grant certiorari to resolve the conflict among the circuits and to clarify the law.

II. THE COURT SHOULD RESOLVE THE CONTROVERSY OVER THE MEANING OF "WILLFUL VIOLATION" BY CONSIDERING ALL AFFECTED STATUTES AND THE PERTINENT LEGISLATIVE HISTORY.

In January 1984, the Chamber filed a brief *amicus curiae* urging the Court to grant certiorari in *TWA v. Thurston*, No. 83-997, to resolve the meaning of the term "willful violation" under the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 626(b). The Court has granted certiorari and recently heard oral argument in that case. The Chamber now urges the Court to grant certiorari in *Laffey* to decide the meaning of "willful violation" under the Fair Labor Standards Act (the "FLSA") and the Equal Pay Act. Only by resolving both cases at the same time can the Court be certain

of properly carrying out Congress' intent in adopting the term "willful violation" in those three related federal statutes governing an employer's obligations to his employees.

A. The Willfulness Issue in *Thurston* Should Be Decided In the Broader Context Illuminated By *Laffey*.

The ADEA, the only statute at issue in *Thurston*, provides that a plaintiff may recover liquidated damages by demonstrating a "willful violation" of the Act. 29 U.S.C. § 626(b). *Laffey* involves the provision of the Fair Labor Standards Act, which includes the Equal Pay Act, permitting an employee to recover a third year of backpay in the case of a "willful violation." 29 U.S.C. § 255.

While *Thurston* appeared to present a relatively narrow issue under the age discrimination statute, the Court's resolution of the willfulness issue in *Thurston* may effectively control the interpretation of the "willful violation" provision of the Fair Labor Standards Act and the Equal Pay Act. Congress adopted the willfulness provision of the Fair Labor Standards Act, 29 U.S.C. § 255, in 1966. *See* Pub. L. No. 89-601. That provision applies to all claims under the FLSA, including those under its Equal Pay Act component. When Congress passed the ADEA the following year, it expressly incorporated § 255 of the FLSA to govern the backpay recovery period under the ADEA, 29 U.S.C. § 626(e)(1). Thus, the "willful violation" language of § 255 establishes the standard for recovering a third year of backpay under all three statutes. At the same time, Congress also incorporated the language of § 255 into the liquidated damages provision of the ADEA, 29 U.S.C. § 626(b), which permits an employee to recover double damages (as well as the extra year of backpay) in the case of a "willful violation" of the ADEA. It is only this latter provision which is at issue in *Thurston*.

As the parties agreed in *Thurston*, there is a natural presumption that a term used twice in the same legislation is intended to convey one meaning. Thus, it is virtually inescapable that the term "willful violation" has the same meaning under both § 626(b) and § 626(e)(1) of the ADEA. In turn, since § 626(e)(1) expressly incorporates § 255 of the FLSA by reference, the same interpretation of the term "willful violation" would have to be followed under the Fair Labor Standards Act and the Equal Pay Act.

Consideration of the meaning of "willful violation" in the broader context of § 255 of the FLSA would aid this Court in reaching a proper construction of the term in light of all the relevant legislative history. As the Chamber stated in its brief in *Thurston*, "Congress did not define the term" in the ADEA and the legislative history of that Act itself "sheds no light on what was intended." Brief *Amicus Curiae* of Chamber of Commerce, at 3. There is, however, legislative history demonstrating Congress' intended meaning when it adopted the term "willful violation" in amending § 255 of the FLSA in 1966. The only detailed, scholarly analysis of this legislative history unequivocally confirms that this Court should adopt the standard which the Chamber advocated in its brief in *Thurston*. *See* Brief *Amicus Curiae* of Chamber of Commerce in *Thurston*, at 4-6. *See also* Note, *Standards of Willfulness And The Fair Labor Standards Act*, 78 Mich. L. Rev. 626 (1980).

B. A Single Standard Under All Three Statutes Will Ensure Consistent, Predictable Results For Employers.

The confusion over the meaning of the term "willful violation" naturally infects cases brought under all three of the statutes at issue. While some courts have required

that "violations of the Act must be deliberate, voluntary, and intentional," others have adopted different standards requiring only some level of awareness of the "possible applicability" of the law to the employer's conduct. *Laffey I*, 567 F.2d at 459. *See also* Brief *Amicus Curiae* of Chamber of Commerce in *Thurston*, at 3-5 (discussing in detail conflicting interpretations of "willful violation" in ADEA cases).

The confusion is compounded by the difficulty of reconciling the differing formulations of "willful violation" with other, related provisions of each of the three statutes involved. Under the Fair Labor Standards Act and the Equal Pay Act, the availability of liquidated damages depends upon whether the employer acted in "good faith" and with "reasonable grounds" for believing the practice was lawful. 29 U.S.C. §§ 216(b), 260. The "willful violation" standard only governs the backpay period. 29 U.S.C. § 255. Under the ADEA, however, the "willful violation" standard governs both the availability of liquidated damages and the backpay period. The meaning of the term "willful violation" thus should be examined in light of the overall statutory scheme and the relationship among these provisions.

The confusion over the meaning of the term "willful violation" creates an enormous burden on employers who, typically, are required to comply with all three statutes. The burden is particularly great for multi-jurisdictional employers who are subject to varying standards of conduct, and for owners of small businesses, who lack the financial resources to keep up to date on the latest legal developments. The Chamber urges the Court to put an end to this conflict and confusion by establishing a single standard for determining willfulness under all three statutes. A single standard would respond to the business community's need for guidance.

III. THE STANDARD ADOPTED BY THE COURT BELOW FOR ASSESSING LIQUIDATED DAMAGES IS UNWORKABLE AND CONFLICTS WITH THE APPROACH IN OTHER CIRCUITS.

The district court in this case originally relied on several factors in deciding to remit liquidated damages; among them were the company's historical practice, industry custom, collective bargaining and employee acquiescence. In *Laffey I*, however, the Court of Appeals ruled that these factors could not be considered in assessing whether an employer had "reasonable grounds" for believing his actions were lawful. 29 U.S.C. § 260. That holding severely limits the grounds on which most employers traditionally have assessed the reasonableness of their conduct, and may make it impossible for many employers ever to demonstrate that they have acted in good faith. Indeed, under *Laffey I*, there may be no case in which an employer could escape double damages. That, obviously, is not what Congress intended.

Laffey I makes "legal uncertainty" the touchstone for determining the reasonableness of an employer's conduct. By narrowly focusing on the "absence of any clear legal precedent or guideline precisely in point," *see* Pet. App. 127a-128a, the Court of Appeals shifts the arena for assessing the "reasonableness" of the employer's conduct from the workplace to the lawyer's office. Whether or not that may be realistic for major corporations with access to legal staffs or law firms, it is highly unfair to small and medium-sized businesses without the resources to turn to lawyers every time they must make an employment decision. Indeed, for most businessmen, the four factors rejected by *Laffey I* are the only available means for gauging their conduct. It is unrealistic to force them to rely instead on "legal precedent" as the *only* means for showing that they acted reasonably in believing that an employment practice was permissible. That outcome would frustrate the congressional intent of moderating the harshness of double damages.

As pointed out in Northwest's Petition (at 23-25), the ruling of the D.C. Circuit conflicts with the holdings of numerous other courts. It also runs counter to Congress' clear purpose in the 1947 portal-to-portal amendments to avoid "immense" and "unexpected liabilities" arising from "long-established customs, practices, and conflicts between employers and employees." 29 U.S.C. § 251(a); *see also* 29 U.S.C. § 251(b). The Chamber urges the Court, which has never considered the liquidated damages provision of the FLSA, to step in to resolve the conflict created by the decisions below and to clarify the standards that are to be applied to employers in thousands of FLSA cases.

CONCLUSION

The Chamber of Commerce respectfully urges this Court to grant the petition for certiorari filed by Northwest Airlines, Inc.

Respectfully submitted,

STEPHEN A. BOKAT
Counsel of Record
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Amicus Curiae Chamber of Commerce of the United States

December 21, 1984